FCRA Class Action Lawsuits: The Sharks Are Circling

By Annual Conference Educational Speaker Craig Bertschi

The phrase “class action lawsuit” is synonymous with big verdicts, big judgments and big settlements. For decades, the most successful plaintiffs’ lawyers in the United States have been those filing class action lawsuits against the tobacco industry, asbestos and automobile manufacturers, pharmaceutical companies, and publicly traded companies alleged to have violated securities laws.

However, due to tort reform, a shrinking pool of asbestos plaintiffs, and legislation making it more difficult to file securities lawsuits, these traditional areas of class action litigation are not nearly as lucrative as they once were. As a result, enterprising plaintiffs’ lawyers are now searching for new targets for class action lawsuits and have turned their attention to the background screening industry.

Over the last five years, there has been a significant increase in the number of class action lawsuits asserting claims under the Fair Credit Reporting Act, and particularly claims alleging violations of the FCRA’s provisions governing the use of criminal background checks for employment purposes. Not surprisingly, the targets of these lawsuits include Fortune 500 companies and retail giants such as Wal-Mart, Dillard’s and Winn-Dixie; however, even smaller employers have been the subject of FCRA class action lawsuits. Background screening companies, which are considered “consumer reporting agencies” under the FCRA, have not been immune from these suits. Since 2007, more than half a dozen background screening companies have been the subject of FCRA class action lawsuits.

What is driving these lawsuits? One word: money.

Single-plaintiff FCRA cases are not lucrative

In the context of single-plaintiff litigation, the FCRA does not provide for large damage awards of the sort that would entice plaintiffs’ lawyers to pursue claims of doubtful merit, make exorbitant settlement demands or file more lawsuits. For example, in cases where the plaintiff alleges that the defendant negligently violated the FCRA, the plaintiff is limited to recovering “actual damages.” Actual damages compensate a plaintiff for losses or injuries that were incurred as a result of the defendant’s negligence. Oftentimes, a defendant’s violations of the FCRA are technical in nature and do not result in any actual damage to the plaintiff (or at least make the plaintiff’s case difficult to prove). Thus, a job applicant who does not receive the post-adverse action disclosures required by the FCRA incurred no actual damages if his consumer report accurately disclosed a criminal conviction that disqualified the applicant from the job he was seeking.

Even in cases where a plaintiff can prove that the defendant willfully violated the FCRA, the damages available under the FCRA are not significant. Plaintiffs proving a willful violation of the statute can recover either their actual damages or statutory damages of $100-$1,000 per violation. While no business wants to throw away $1,000 or incur attorneys’ fees to defend a lawsuit, these single-plaintiff cases rarely lead to financial ruin for defendants.

The FCRA is tailor-made for class actions

Class actions are litigation by proxy, in which an individual plaintiff brings a lawsuit on behalf of a group or “class” of people who have all suffered the same injury. In a class action, the plaintiff or “class representative” proves not only his own claims, but also the claims of all absent members of the class, i.e., the people who are not actively involved in the lawsuit. If the plaintiff prevails, then the defendant is liable for the damages suffered by

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the entire class, not just the individual bringing the lawsuit. Thus, the larger the class the larger the defendant’s exposure.

For many reasons, FCRA claims against CRAs that provide background screening services and employers who rely on criminal background checks in the employment process are well-suited to class action lawsuits. First, CRAs and employers typically follow routine procedures when preparing background checks and screening job applicants. If those procedures do not comply with the FCRA, then it is likely that a class of people, rather than an individual, may have been harmed.

Second, if the plaintiff can plead and ultimately prove a willful, as opposed to a negligent, violation of the FCRA, then he can recover statutory damages or $100-$1,000 per violation. The ability to recover statutory damages is the critical component to the success of FCRA class action lawsuits because it eliminates the need for plaintiffs to prove actual damages. Thus, FCRA class action lawsuits are often litigated even though the plaintiff and members of the class were not injured in any way by the defendant’s actions.

Third, there are no caps or limits on a defendant’s exposure under the FCRA. Many consumer protection statutes, like the Truth in Lending Act and the Fair Debt Collections Practices Act, contain limits on the total amount of damages that can be awarded against a defendant in class action litigation. For example, in FDCPA cases, plaintiffs are limited to recovering $500,000 or 1 percent of the defendant’s net worth, whichever is greater. The FCRA has no analogous limit on damages.

Against this backdrop, what impact does a class action, versus a single-plaintiff lawsuit, have on the incentives to bring lawsuits?

Plaintiffs’ math: The numbers get big

In any class action lawsuit, one of the most important questions that plaintiffs’ counsel must answer is “How many people are in the class?” Large employers screen thousands of job applicants every year, and the FCRA has a two-year statute of limitations. Thus, if an employer fails to follow FCRA guidelines in connection with the employment screening process, it is potentially subject to a class action lawsuit involving tens of thousands of plaintiffs. Given the potential for the recovery of statutory damages, a defendant’s exposure can be enormous.

For example, assume an employer screens 4,500 job applicants every year. Applying the two-year statute of limitations, the employer faces a class of 9,000 plaintiffs. If the plaintiff alleges a willful violation of the FCRA, our hypothetical employer faces a minimum exposure of 9,000 x $100, or $900,000. At the high end, the hypothetical employer faces potential damages of 9,000 x $1,000, or $9,000,000. Even small employers that screen only a few hundred applicants a year can face ruinous exposure, e.g., 600 x $1,000, or $600,000. These same formulas apply to CRAs that are sued in FCRA class actions.

When facing this enormous exposure in FCRA class actions, defendants have two options: (1) roll the dice on litigation or (2) settle the case out of court. Courts are aware of this dynamic, but have nevertheless refused to limit the coercive use of class action lawsuits. For example, in Bateman v. American Multi-Cinema Inc., the Ninth Circuit Court of Appeals recently ruled that an FCRA class action could proceed despite the fact that (1) the case “could result in enormous liability completely out of proportion to any harm suffered by the plaintiff” and (2) class certification might “force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” Under these circumstances, it is little wonder that FCRA class actions are almost always settled out of court.

Big exposure and big settlements incentivize plaintiffs’ lawyers

When an FCRA class action is settled, plaintiffs’ counsel are customarily awarded attorneys’ fees based on a percentage of the money or “fund” that they recovered for the class as a whole. In such situations, attorneys’ fees awards can range anywhere from 20 to 33 percent of the class recovery. Thus, plaintiffs’ lawyers stand to earn hundreds of thousands or even millions of dollars in fees in FCRA class actions. Naturally, the potential for large judgments has caught the attention of some of the best plaintiffs’ class action firms in the country. These firms, which can be found with a simple Google search, are now actively advertising for clients to bring FCRA class action lawsuits.

In today’s litigious society, CRAs and employers are under constant threat of being sued and forced to pay dearly to settle cases of even doubtful merit. The best way to defend against class action lawsuits altogether is to ensure that your procedures are FCRA-compliant.

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